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LAI CHENG CHEONG

v.

SOWARATNAM ARUMUGAN

FEDERAL COURT, KUALA LUMPUR

WAN SULEIMAN FJ

b

GEORGE SEAH FJ

MOHD AZMI FJ

[CIVIL APPEAL NO. 194 OF 1982]

30 APRIL 1983

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ADMINISTRATIVE LAW: *Certiorari* - Application for leave to apply to quash decision - Contrary to natural justice - Bias - Opposition - Failure to exercise right of appeal under ss. 77(1), (2), Employment Ordinance 1955.

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The appellant had applied *ex parte* to the High Court for leave to be given for an application for an order of *certiorari* to remove into that Court and to have the decision of the Labour Officer quashed. The Attorney-General opposed the application on the ground that the applicant had not exhausted his right of appeal to the High Court under s. 77(1) and (2) of the Employment Ordinance, 1955. The trial Judge had dismissed the application. The appellant appealed.

Held:*e*

[1] Somewhat different considerations govern the exercise of the Court's discretion in deciding whether *certiorari* would apply from those which govern the exercise of its discretion in making a declaratory judgment. [*Metal Industries Employees Union v. Registrar of Trade Unions & Ors.* [1976] 1 MLJ 220 and *The Land Committee of Federal Territory v. Harper Gilfillan* [1981] 1 MLJ 234 distinguished].

[2] The existence of alternative remedies have negligible effect on restricting the inherent powers of the Courts to provide suitable relief.

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[3] An applicant for *certiorari* is not normally obliged to have exhausted his right of appeal within the administrative hierarchy nor to a Court of law. Judicial review is fundamentally different from appeal [*R. v. Postmaster-General, Ex. p. Carmichael* [1928] 1 KB 291; *The King v. Wandsworth Justices* [1942] 1 KB 281].

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[4] The jurisdiction of the Courts is supervision, for the purpose of enforcement of Parliament's mandate to the tribunal and to see that the tribunal makes the authorised inquiry according to natural justice and arrives at a decision. [*Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147, 195].

[Appeal allowed.]

Cases referred to:*h*

Metal Industries Employees Union v. Registrar of Trade Unions & Ors. [1976] 1 MLJ 220

The Land Committee of Federal Territory v. Harper Gilfillan [1981] 1 MLJ 234

R. v. Postmaster-General Ex. p. Carmichael [1928] 1 KB 291

The King v. Wandsworth Justices [1942] 1 KB 281

Anisminic v. Foreign Compensation Commission [1969] 2 AC 147

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Legislation referred to:

Employment Ordinance 1955, ss. 77(1), (2)
National Land Code 1965, ss. 418, (1)
Rules of the High Court 1980, O. 55 r. 1(2)
Rules of the Supreme Court 1957, O. 54A
Trade Unions Ordinance 1959, ss. 2(2), 17

Other sources referred to:

S.A. de Smith's Judicial Review of Administrative Action, 4th Edn., pp. 423, 425
Administrative Law, H.W.R. Wade, 4th Edn., pp. 36 to 38
For the appellant - Lee Hock Beng; M/s. Michael Chen & Lee
For the respondent - Abu Mansor b. Ali, SFC

JUDGMENT

The appellant had by way of notice of motion, applied *ex parte* to the High Court for leave to be given for an application for an order of *certiorari* to remove into that Court and quash the decision of the Labour Officer, one P. Parvadi, made on 27 April 1982 (given in the statement filed pursuant to O. 55 r. 1(2) of the Rules of the High Court 1980):

- (1) That the proceedings at which the said decision was made were and appeared to be conducted in a manner contrary to natural justice.
- (2) That the Labour Officer was biased.

The Attorney General, in his notice of motion opposed the application for leave on the ground that applicant had not exhausted his right of appeal to the High Court under s. 77(1) and (2) of the Employment Ordinance 1955.

The learned trial Judge made his decision on the basis that the issue was whether a declaratory relief is available to the applicant when the statute (the Employment Ordinance) already provides a special procedure for appeal.

In his judgment he cited two decisions of this Court. The first was *Metal Industries Employees Union v. Registrar of Trade Unions & Ors.* [1976] 1 MLJ 220, in which the appellant sought for certain declarations including a declaration that the Registrar of Trade Unions had no power under s. 2(2) of the Trade Union Ordinance 1959 to rule that workmen of a certain company could not properly be members of a union.

It should be noted that under s. 17 of the Ordinance as amended by Act 90, applicable at that time, any person dissatisfied with the opinion of the Registrar given under s. 2(2) may appeal to the Minister, but no such appeal had been lodged.

The learned Judge remarked that although that case was an application for a declaration under O. 54A of the Rules of the Supreme Court then, and the application before him is an application for *certiorari*, the principles are the same. He then went on to cite a passage from Zamir on Declaratory Judgments at p. 226 which reads as follows:

The decision of the Court may, accordingly, vary from case to case. It is suggested, however, that a general tendency can be made out. The High Court is usually inclined, unconsciously perhaps, to grant declaratory relief where the alternative remedy is one within its jurisdiction - usually it will be a non-statutory remedy - e.g. damages, an

a injunction, or a prerogative order. In such cases the Court, when making a declaration, is sure not to encroach on jurisdiction assigned to another tribunal. The High Court, on the other hand, is disinclined to entertain a declaratory action where the alternative remedy is by recourse to another tribunal - this will usually be a statutory remedy - e.g., an appeal to a Minister.

b There are good reasons for this attitude. First, the Legislature, by conferring jurisdiction in certain matters on a specified tribunal, presumably intended this tribunal to be the ordinary forum for the adjudication of these matters. And secondly, the specified tribunal is often better qualified for dealing with the matters assigned to it.

We should also like to note that in dismissing the appeal, Gill CJ agreed that the Court should not exercise its discretion by refusing to make the declaration because the statutory remedy provided by s. 17 better suits the case and will more satisfactorily dispose of the dispute.

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The next authority on which his Lordship relied was another decision of this Court. In *The Land Committee of Federal Territory v. Harper Gilfillan* [1981] 1 MLJ 234 an application was filed for a declaration on the true construction of the National Land Code. The appellant applied to set aside the originating summons *inter alia* on the ground that the respondents had failed to exercise their right of appeal under s. 418 of the National Land Code.

Section 418(1) reads

e Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.

After considering numerous authorities advanced on behalf of both sides, Raja Azlan Shah, Ag. LP (as he then was) said at p. 237:

f First of all we have to see the nature of the claim. It is an action for a declaration that conversion is not necessary before sub-division. That is a question of law by virtue of a statutory provision in s. 124 of the National Land Code. If the relevant authority commits an error in the interpretation of the section, then an aggrieved party has a right of appeal to the High Court under s. 418 of the Code. Parliament has on the ground of public policy found that that is a just and necessary right. But in the same section Parliament has also enacted a special procedure of enforcing that right. If the right had been simply created and no specific method of enforcing it had been provided for, the existing law itself would have provided a method through the Court already invested with jurisdiction to determine a claim of that nature. But a specific method having been created by providing a time-limit within which the right may be pursued, it becomes a question whether that method is exclusive or not. That depends, not upon any rigid rule, but upon the intention of Parliament appearing from the Code.

And further down on the same page, his Lordship said:

h We now ask ourselves, what is there in the National Land Code which bars declaratory relief. Section 418 of the Code must now be looked at. If on a proper reading of it leads one to the conclusion that it is the intention of Parliament to create the right absolutely and independently of any specific form of remedy, the respondents' action is well maintained. If on the other hand the proper interpretation is that the right and the remedy are *uno latu*, that they are not mutually exclusive, that they are part and parcel of the remedy, then the action is misconceived.

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Reading s. 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it.

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Mr. Lee for the appellant contends that s. 77 of the Act does not provide an exclusive remedy in that it is (i) permissive, not mandatory, since the word “may” appears in s. 77(1) thereof; (ii) it is not the only remedy available to a dissatisfied person, and (iii) it does not oust the right to a judicial review.

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It would seem to us that somewhat different considerations govern the exercise of the Court’s discretion in deciding whether *certiorari* would apply from those which govern the exercise of its discretion in making a declaratory judgment. For instance the right to *certiorari* or prohibition may be lost by acquiescence or implied waiver, or unreasonable delay in seeking the relief. See S.A. de Smith’s *Judicial Review of Administrative Action* - Fourth Edn. p. 423.

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The existence of alternative remedies have negligible effect on restricting the powers of the Courts to provide relief. At p. 425 of the same edition appears the following passage, under the heading “Effect of Alternative Remedies”:

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The existence of a right of appeal to the Courts from a tribunal’s decision does not deprive the Courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the Courts.

An applicant for *certiorari* is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy - see *R. v. Postmaster-General, Ex. p. Carmichael* [1928] 1 KB 291.

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Nor need he have, before he can apply for that remedy, exhausted his right of appeal to a Court of law. Thus, in *The King v. Wandsworth Justices* [1942] 1 KB 281 two summonses were preferred before Wandsworth Justices by the inspector of weights and measures for the county of London against the applicant, Henry Read, a butcher, charging him with having misrepresented by means of tickets the weight of certain meat which he offered for sale. At the hearing of the summonses the tickets were not produced, and, the applicant’s Counsel having objected to their absence, the solicitor representing the inspector agreed that the question whether or not the absence of the tickets had been satisfactorily accounted for should be treated as a preliminary issue in the proceedings to be decided before determination of the summonses on their merits. The justices, having heard evidence and arguments, withdrew to consider the matter. On their return after a considerable time, the chairman announced that the applicant was acquitted on one summons and convicted on the other and a fine of 10s. was imposed. The applicant obtained leave to make this application for an order of *certiorari* to remove the conviction into the Court that it might be quashed.

*f**g*

Of particular significance to the present appeal are the words of Viscount Caldecote CJ at p. 284 which reads:

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It remains to consider the argument that the remedy of *certiorari* is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this Court to consider as a question of law whether the justices were right in convicting a man without

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- a* hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of *certiorari* to quash his conviction, the Court should be debarred from granting his application. It has been admitted by the justices that a mistake was made. This Court is in a position to remedy that mistake by making an order of *certiorari* to quash the conviction, and that is the order which this Court should make.
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We were also referred to a passage in the Fourth Edition of *Administrative Law* by H.W.R. Wade at pp. 36 to 38 which we find most illuminating. The relevant portion is reproduced hereunder:

- c* Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the Court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the Court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the Court quashes an order made by a minister under some Act, it will normally use its common law power to declare that the Act did not entitle the minister to do what he did.
- d* Where the proceeding is an appeal, some superior Court or authority will reconsider the decision of some lower Court or authority on its merits ...
- Judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the Court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not.
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In *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 at 195 Lord Pearce in dealing with the general jurisdiction of the Courts in the administration of justice in Britain said:

- f* Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.
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and further down on the same page:

- The Courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review.
- h* That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise (*Rex v. Nat Bell Liquors Ltd.* [1922] 2 AC 128, 156).

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It is simply an enforcement of Parliament's mandate to the tribunal. If the tribunal is intended on a true construction of the Act to inquire into and finally decide questions within a certain area, the Courts' supervisory duty is to see that it makes the authorised inquiry according to natural justice and arrive at a decision whether right or wrong.

We would therefore allow this appeal, set aside the order of the Court below, and grant the application for leave. Costs to be costs in the cause.

Deposit to the appellant.

Also found at [1983] 1 CLJ 282

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